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89-1976

In The

Supreme Court of the United States

October Term, 1989

LOUIS AURICCHIO, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Third Circuit violated the precedents of this Court and of other Circuits, when it held that a trial judge does not have an obligation to conduct a *voir dire* inquiry of a juror when, during deliberations, the trial judge learns that the juror, prior to the time that the case was submitted to the jury for its consideration, had violated his oath by formulating and expressing an opinion reflecting ethnic bias as well as the consideration of extrinsic evidence?

2. Whether the United States Constitution and the Federal Rules of Evidence permit the impeachment of a witness by ten-year old collateral evidence, *to wit*, evidence that the witness, an attorney who represented defendant in a traffic proceeding ten years earlier, had failed to act when he knew that defendant contemplated perjuring himself during that proceeding, but where such perjury was never actually committed?

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Petitioner Louis Auricchio, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of conviction entered by the trial court.

OPINIONS BELOW

The opinion of the Court of Appeals (3a) is not reported. The opinion of the District Court (13a) is also not reported.

STATEMENT OF JURISDICTION

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, which

was entered on February 27, 1990 (3a).[1] The Third Circuit's judgment affirmed the judgment of the District Court which had been entered on July 27, 1989 (23a). The District Court had subject matter jurisdiction over this case pursuant to 18 U.S.C. § 3231. A petition for rehearing and for rehearing en banc was denied by the Third Circuit Court of Appeals on April 16, 1990 (1a). This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Federal Rules of Evidence, which are set forth in the appendix, are pertinent: Rule 404(b), Rule 608(b), Rule 606(b).

The following provisions of the United States Constitution are also pertinent: the Fifth and Sixth Amendments.

STATEMENT OF THE CASE

A. Introductory Statement

This appeal presents important questions that go to the heart of the rights of an accused to a fair trial by an impartial jury. In a written opinion, the Third Circuit held that it was powerless to order a new trial even though it specifically acknowledged that it was likely, as the result of a note sent to the trial judge by one of the jurors, that a juror had violated his oath and the trial court's pretrial instructions by forming an opinion against petitioner prior to the conclusion of the trial (page 12a annexed hereto at note 3). The opinion had likely been formed as a result

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1. References to lower case "a" are to the pages of the appendix annexed to this petition. References to upper case "A" and "SA" are to the appendix and supplemental appendix filed with the Third Circuit Court of Appeals.

of substantial publicity which had been attendant to the trial. One newspaper article, which contained a bold print headline referring to petitioner as a "mob star" appeared above an oversized picture of petitioner (page 26a, attached hereto). The article had been brought into the jury room by one of the jurors during the trial. Both the headline and picture were seen by various jurors, though the jurors initially refused to admit upon questioning by the trial judge to having seen the article. When the trial judge was alerted to the bias of one of the jurors during the jury's deliberations, he refused to conduct a *voir dire* of the infected juror to determine whether an extrinsic source was responsible for the juror calling petitioner a member of the "Mafia" during deliberations when there was *no evidence whatsoever* before the jury that petitioner was in any way associated with organized crime.

This error, coupled with other serious evidentiary errors commited by the trial judge, resulted in petitioner being convicted on three counts of tax evasion. Petitioner was sentenced by the trial court to serve three consecutive four-year terms for the offenses, one of which involved an alleged underreporting of only $3,409 in income.

B. Statement of Material Facts

On January 15, 1988, a Grand Jury of the United States District Court for the District of New Jersey filed a three-count indictment against petitioner Louis Auricchio, Jr., charging him with tax evasion in the years 1981, 1982 and 1983 (A7). A superseding indictment was filed by the grand jury on July 13, 1988 (A12). The superseding indictment was identical in all respects to the original indictment except that the superseding indictment contained a fourth count charging petitioner with conspiring to distribute and to possess with the intent to distribute cocaine (A16). After a 19-day trial, the jury found petitioner guilty of the tax

evasion counts and a mistrial was declared on the drug count because the jury could not reach a verdict on that count.

From the beginning, petitioner's trial had received substantial publicity. Articles appeared in the widest circulating newspapers in the state of New Jersey, accusing petitioner of having ties to organized crime. Because of the widespread publicity, the trial judge, during jury selection, as well as at the end of the first day of trial, and at various times thereafter, instructed the jury not to read about or discuss the case. Despite the court's instruction, juror number 1, on the second day of trial, brought into the jury room with him a newspaper containing an article about the trial. *See* page 26a annexed hereto. An oversized photograph of petitioner appeared in the center of the article and above the photograph, in bold, large type, appeared the headline "Tax-drug trial told new mob star lived like king." *Id.*

After learning from the court clerk that the newspaper had been brought into the jury room by juror number 1, the trial judge asked the jurors collectively whether any had seen the article or picture. Although various jurors had indeed seen the article which had been brought into the jury room, *not one* of the jurors responded to the court's inquiry (A377). The court thereafter questioned juror number 1, who then admitted to the judge that he had brought the newspaper into the jury room and that he had seen petitioner's picture. The juror denied, however, having read the article or having seen the headline referring to petitioner as a "mob star", despite the significant size of the print (A378). The juror told the judge that he had notified the other jurors of the article and picture and had instructed them not to read the article (A378). The juror stated that other jurors had seen the picture, but had not read the article (A378).

The judge then questioned the other jurors. Notwithstanding their earlier refusal to respond honestly to the trial judge's inquiry

and acknowledge that they had seen the newspaper article in the jury room, alternate juror number 1 (A380, A391), juror number 3 (A380-A381), juror number 8 (A388), juror number 12 (A390), and alternate juror number 3 (A392) admitted to having seen the picture of petitioner, but each denied having seen the headline or article. Petitioner moved for a mistrial, but the motion was denied (A393).

At trial, the government attempted to prove that petitioner had evaded taxes. To prove the tax charges, the government offered evidence, through the net worth method of reconstructing income, of amounts that petitioner had spent in the tax years, 1981, 1982 and 1983. It then compared the the amount he reported on his tax return, to show that there was an underreporting of income.

Petitioner never disputed the amounts the government claimed he had spent in the tax years in question. Rather, his defense was that the monies he had spent came from nontaxable sources, namely loans of hundreds of thousands of dollars made to petitioner by his father, a multimillionaire owner of a successful manufacturing business, and the sale of silver coins which had been collected by petitioner over many years. Petitioner's father, who had been called by the government to testify, offered corroborative testimony on both of these matters. He testified that petitioner had a very valuable collection of coins, collected since 1977 in approximately 55 to 60 quart jars, which petitioner sold in the relevant tax years for approximately $250,000 (A1982). Petitioner's father also testified that he had made substantial loans to his son beginning in 1981 and that those loans were evidenced by a $500,000 promissory note consolidating the indebtedness that had been prepared and signed in the office of petitioner's attorney Gerald Lynch.

Gerald Lynch was called by petitioner to corroborate the

legitimacy of the $500,000 promissory note. Lynch testified that before the consolidation note had been prepared, he had personally viewed between five and ten of the underlying notes and he remembered that at least two of the consolidated notes were in the amount of $50,000.

On cross-examination, the government, over the vigorous objection of petitioner (A2881-A2885), was permitted to impeach Lynch with questions concerning municipal traffic offenses that he had represented petitioner on ten years earlier. Through its questioning, which was based upon notes contained in the file of Lynch, the government was permitted to suggest to the jury: that Lynch was prepared to allow petitioner to testify falsely at his municipal trial; that petitioner had been driving while on the revoked drivers' list; that petitioner, on one occasion, when driving unlawfully, switched places with his girlfriend, who was a passenger, before the police stopped the car; and that a female passenger in petitioner's car on a second occasion, would plead guilty to traffic offenses allegedly committed by petitioner (A3051-A3053). Subsequent to the questioning, and again over the strenuous objection of petitioner, the court admitted Lynch's notes into evidence (A3008-A3009).

The government used the 1979 municipal court matter to hammer away at the credibility of Lynch's testimony respecting the loans made by petitioner's father to petitioner:

> Mr. Lynch saying there were $50,000 of notes that he saw is somewhat questionable, especially because of what you know about Mr. Lynch, which is that ***he is an attorney who in his own notes, a municipal court case indicated that he was prepared to present false testimony in a court.***

(A3540) (emphasis supplied).

The prosecutor then emphasized that the jury should look at the notes prepared by Lynch:

> I notice Mr. Querques asked Mr. Lynch questions about those notes, but *you look at those notes yourself.* I don't remember the exhibits numbers right now. *You look at what Mr. Lynch wrote in his own notes. When you look at that you will see that you cannot trust Mr. Lynch's testimony in this case.*

(A3540) (emphasis supplied).

The government's inflammatory questioning of Lynch on a ten-year old collateral matter and its use of extrinsic evidence for impeachment purposes was devastating to petitioner's defense. Once the jury disbelieved Lynch about the $500,000 note, it would have had to conclude that petitioner, who signed the note, had fabricated it. Petitioner, who did not testify at trial, never had the opportunity to respond to the highly collateral matters which were used to impeach Lynch. The rejection of Lynch's testimony also resulted in the jury's rejection of the testimony of petitioner's father, who not only testified about the validity of the note and loans, but about petitioner's sale of his substantial coin collection as well.

That these collateral matters and other extrinsic evidence which had come to the attention of the jury influenced its decision, is evident from a note written during jury deliberations by juror number 3 to the jury foreperson complaining about juror number 5 (annexed hereto at page 25a). The note had been given by the jury foreperson to the court on the second day of the jury's deliberations. In the note, juror number 3 stated that juror number 5 should be disqualified because he had judged petitioner's guilt "starting from day one" of the trial, "without hearing from one

witness for the defense" (*id.*). The note also stated that juror number 5 had declared during jury deliberations that petitioner was in the "Mafia" and that "if we believed Louis Jr.'s father gave him $325,000 we've got to be crazy." Juror number 3 correctly stated in his note that there was never any proof offered at petitioner's trial that he was in any way connected with the "Mafia".

After the court received the note and advised counsel of it, a discussion ensued between counsel and the court about how to proceed. Petitioner's attorney noted that juror number 5 had violated his oath by prejudging petitioner's guilt (A3742) and by reading newspapers, which throughout the trial had contained articles referring to petitioner as an alleged organized crime figure (A3744).

Upon learning of juror number 5's reference to petitioner being in the "Mafia" and his prejudgment of the case, petitioner moved for a mistrial. The court denied the motion, but noted that juror number 3's observations were "probably correct" and they if they were correct, juror number 5 would have to be disqualified because of his bias:

> THE COURT: We have a letter from Mr. LaRosa to the foreman making certain statements *which I suspect are probably correct.*
>
> *If they are in fact correct, and he has — had a fixed determination, then he obviously is not in a position to decide the case.*
>
> *He could be excused, and I would interrogate the other jurors individually about any of the particular allegations here, whether anything had happened in the discussions which would prevent*

them from deciding the case on the evidence.

(A3746) (emphasis supplied).

Although the trial judge was initially inclined to conduct a *voir dire* of the jury, he was dissuaded from so doing by the government attorney, who contended that such questioning was barred by Rule 606(b) of the Federal Rules of Evidence, which restricts *postverdict* impeachment of a jury's verdict. The judge also found that juror number 5's "Mafia" remark could have come from a reference during the trial to a social club where vending machines were stored.

On his appeal to the Third Circuit, petitioner pointed out to the court that out of 4,000 pages of trial transcripts the words "vending machine" or "social club" appear six times (A1454, A1455, A2926, A2937, A2947, A3169) and that *not one* of those references even hints at organized crime. Despite there being *absolutely no evidence* whatever in the record of petitioner being connected to the Mafia, the Third Circuit perfunctorily and, obviously without examination of the record, concluded that nothing in the record suggested that the trial judge's findings were clearly erroneous or that the judge erred in refusing to conduct a *voir dire* of juror number 5 upon receipt of the note from juror number 3.

Although the court agreed that juror number 5 had violated his oath and the trial court's instructions by prejudging petitioner's guilt (12a, note 3), it patently misstated the law, holding "we know of no authority for the proposition that this is the kind of error (a juror's violation of his oath) that requires reversal and a new trial." *Id.* As will be set forth herein, the Third Circuit's plain misapplication of the law of this Court completely ignores petitioner's absolute right to an unbiased jury, permits jurors to violate their oath with impunity, and cries out in the most emphatic terms possible for consideration by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT GROSSLY MISAPPLIED THE LAW OF THIS COURT IN HOLDING THAT IT WAS POWERLESS TO REVERSE A JUDGMENT OF CONVICTION IN A CASE WHERE THE COURT ACKNOWLEDGED THAT A JUROR HAD LIKELY VIOLATED HIS OATH BY FORMING AN OPINION AS TO PETITIONER'S GUILT BEFORE ALL THE EVIDENCE WAS ADDUCED, AND WHERE THE TRIAL JUDGE HAD REFUSED TO CONDUCT A *VOIR DIRE* INQUIRY OF THE JUROR TO ASCERTAIN THE EXTENT OF ANY TAINT, WHEN THE JUDGE KNEW THAT A NEWSPAPER ARTICLE REFERRING TO PETITIONER AS A "MOB STAR" HAD BEEN BROUGHT INTO THE JURY ROOM BY ANOTHER JUROR.

This Court has long recognized that one of the most important rights an accused has under the United States Constitution is the right to a fair trial by a panel of "impartial, indifferent jurors." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961). This right, to an impartial jury, commences with jury selection and ends when the jury returns its verdict. *Olson v. Bradrick,* 645 F. Supp. 645, 653 (D. Conn. 1986). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Patton v. Yount,* 467 U.S. 1025, 1051 (1984).

In deciding this case, the Third Circuit specifically found that it was reasonable to infer that juror number 5 had violated his oath by ignoring the trial court's instructions to not prejudge petitioner's guilt. *See* page 12a, note 3, annexed hereto. Despite the court's acknowledgment that the juror had likely violated his oath, the court held that no remedy was available to petitioner

for this plain violation of his constitutional rights. The court stated:

> Appellant also stresses that juror #3 [sic] improperly formulated an opinion concerning the implications of the trial testimony before all of the evidence had been presented in violation of the district court's instruction that decision should be reserved until that point. *While we agree that it is a fair inference that juror #3 [sic] did not follow the court's pretrial instruction, we know of no authority for the proposition that this is the kind of error that requires reversal and a new trial.*

(12a, note 3).

The Third Circuit's decision is at odds with fundamental constitutional principles and with a substantial body of case law applying those principles. Even the trial judge initially expressed his belief that juror number 5 had violated his oath and had a "fixed determination" of petitioner's guilt, before all the evidence was received, thereby requiring disqualification of the juror. The only reason that the trial judge did not conduct a *voir dire* of the juror was because the judge erroneously accepted the government's contention that Rule 606(b) of the Federal Rules of Evidence, which restricts *postverdict* inquiries into the jury's deliberative processes, barred *voir dire* examination of the juror. *See United States v. Clambrone,* 787 F.2d 799, 811 (2d Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S. Ct. 665 (1987) (*voir dire* conducted during deliberations when juror remarked that petitioners were "part of the mob"); *United States v. Vento,* 533 F.2d 838, 869 (3rd Cir. 1976) (trial court "obliged" to investigate where jurors may have been exposed to prejudicial information).

Although the trial court has some discretion in deciding when to conduct a *voir dire* examination, *Government of the Virgin*

Islands v. Dowling, 814 F.2d 134 (3rd Cir. 1987), *cert. denied,* ____ U.S. ____, 109 S. Ct. 1309 (1989), its refusal to conduct such an examination is wrongful when premised upon a misunderstanding of the law, to wit, its belief that such examination is barred by the evidentiary rule against the impeachment of verdicts. It is respectfully submitted that the trial judge, believing that the juror had violated his oath and the court's repeated instructions, had *an obligation* to conduct a *voir dire* to ensure that the juror could put his prejudices aside in judging petitioner's guilt or innocence. A simple instruction to decide the case based upon the evidence, in the absence of a *voir dire* examination of the juror, was meaningless because the juror had already disregarded the trial court's prior repeated instructions to decide the case only after all the evidence was in.

Certainly, if a potential juror expressed a belief, prior to trial, that he had a bias which could not be put aside, that juror would have to be excused for cause. *Cf., Rosales-Lopez v. United States,* 451 U.S. 182, 187 (1980) (adequate *voir dire* necessary for court to exercise responsibility to remove jurors not able to follow court's instructions impartially). The result can be no different if a juror's bias is discovered after the jury has been impanelled. The court must know, through questioning of the juror, whether his bias can be put aside. The failure to make such an inquiry "deprives the trial court of the benefit of the factual predicate that justifies an exclusion for cause." *United States v. Salamone,* 800 F.2d 1216, 1226 (3rd Cir. 1986), *appeal after remand,* 869 F.2d 221, *cert. denied,* ____ U.S. ____, 110 S. Ct. 246 (1989).

Aside from failing to recognize that the law requires reversal when the trial court fails to act once being presented with evidence of a juror's violation of his oath and of the Court's instructions, the Third Circuit also failed to appreciate that the source for juror number 5's reference to petitioner being in the Mafia could not have been from *any* evidence introduced at trial: there was not

one grain of such evidence and the trial court's belief that an isolated reference in the record to a social club or a vending machine adequately explains juror number 5's expression of bias is nothing more than a thinly veiled attempt to justify the unjustifiable, and to permit the conviction of petitioner not for what he allegedly did, but for who he was alleged to be by the newspapers. Plainly, the most logical reason that juror number 5 would have accused petitioner of being in the Mafia was the newspaper article which found its way into the jury room. This Court is urged to examine the article, which is appended hereto at page 26a, and ask itself: Is it reasonable to believe that the jurors, as they claimed, would have seen the picture in the paper, but not the oversized bold print headline right above the picture? Even if the trial court accepted the jurors' original explanation that they did not see the headline or content of the article, was the court not obligated to conduct further inquiry when the "Mafia remark" of juror number 5 was brought to the court's attention? *See, e.g., United States v. Clambrone,* 787 F.2d 799, 811 (2d Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S. Ct. 668 (1987) (*voir dire* conducted when, during deliberations, juror remarked that petitioners were "part of the mob" and were "on the fringe of the Mafioso").

A gross injustice has occurred here. The jury and the trial court may have disliked petitioner for who he is alleged to be, and the Third Circuit might have felt the same. Prejudice, all too often and all too easily seeps its way into the judicial process. When decisionmaking is consciously or subconsciously affected by extrinsic prejudicial evidence or when persons are convicted not for what they did but for who they are alleged to be, the entire process suffers. For this reason, this Court has held that a presumption of prejudice arises where extrinsic evidence filters its way into the decisionmaking process. *See, e.g., Remmer v. United States,* 347 U.S. 227, 229 (1954). It is respectfully submitted that a grave mistake, affecting the most fundamental rights

guaranteed under the Constitution has occurred here and the error is in dire need of correction. Petitioner implores this Court, upon its careful examination of this record and of the case law cited in this petition, to confirm that the Third Circuit has announced an erroneous legal principle which would permit jurors to violate their oaths with impunity. It is respectfully submitted that when a trial judge learns that a juror has failed to follow an instruction to not prejudge a defendant's guilt, particularly when extrinsic prejudicial evidence has invaded the jury room and ethnic prejudice has been expressed by a juror, the court has an obligation to conduct a *voir dire* of the juror to ascertain the extent of the taint. Because these fundamental principles were not followed, petitioner was denied a fair trial. For these reasons, petitioner respectfully requests this Court to grant this petition for a writ of certiorari.

II.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW BY THE TRIAL JUDGE'S HIGHLY IMPROPER ADMISSION OF TEN-YEAR OLD EXTRINSIC IMPEACHMENT EVIDENCE DURING CRITICAL STAGES OF PETITIONER'S TRIAL.

At trial, petitioner presented a simple and straightforward defense — the government, in calculating taxes purportedly owed by petitioner, failed to take into account: $325,000 petitioner had received in loans from his father; profits petitioner had made from the sale of his coin collection; and income undisputably earned by petitioner during his employment at his father's factory for the years 1973 through 1976. Of these three omissions, the most important, by far, was the government's failure to take into account the loans made to petitioner by his father. Whether the jury accepted that loans were made by Louis Auricchio Sr. to his son depended entirely upon the jury's evaluation of the

credibility of the witnesses supporting petitioner's defense. Two witnesses were crucial on this issue: petitioner's father and attorney Gerald Lynch.

Petitioner's father testified that he had lent his son $325,000 during the period 1981 to 1983 (A1906), that he took notes from his son for the various loans that were made (A1895), that the sum of the notes was calculated at the office of attorney Gerald Lynch (A1906), that the consolidated note, in the amount of $500,000, which included interest, was prepared and signed at the office of Gerald Lynch (A1914), and that petitioner tore up the old notes after the consolidated note was signed (A1897).

The government attempted to impeach petitioner's father by examining him on alleged inconsistencies between his testimony and a statement he had given four years earlier to agent Palka. Among the questions asked of Louis Auricchio, Sr. by the government were whether he had told agent Palka that the amount of money loaned to petitioner was $500,000 and whether he originally told the agent that the note was signed in 1982, when petitioner was married, and not in 1984, which is the date on the instrument (A1918-A1919). Agent Palka himself testified that "discrepancies" in Louis Auricchio Sr.'s statement, as well as his failure to supply records evidencing the loan, caused him to not account for the loans in calculating petitioner's tax liability (A2295).

Because of the government's attack on the credibility of Louis Auricchio, Sr., the testimony of attorney Gerald Lynch assumed special prominence at trial. Lynch's direct testimony corroborated the testimony of Louis Auricchio, Sr. Lynch testified that the $500,000 note was prepared in 1984 (A3023), that he prepared the note at the request of the father (A3028), that he remembered petitioner and his father coming into his law office to sign the note (A3023), that the father brought with him the underlying

notes which were merged into the consolidated note (A3023), that the notes were for large sums (A2873), and that at least two of the notes were in the amount of $50,000 (A3027).

Shortly into the cross-examination of Lynch, the Assistant United States Attorney inquired into whether he had represented petitioner in a Monmouth County Municipal Court matter (A3031). Counsel for petitioner objected to the question and a sidebar conference was held with the trial judge (A3032). At sidebar, the prosecutor stated that he intended to bring up municipal court matters involving petitioner driving on the revoked drivers' list, but that he did not "intend to pursue it for any reason of showing prior bad acts by [petitioner]" (A3032). The prosecutor then elaborated:

> MR. ASHRAFI: I have information that Mr. Lynch, or perhaps somebody else in his firm, I'm not sure at this point, was prepared to put on a witness in a municipal court matter who would lie about the municipal court proceedings.
>
> I think I can use that to impeach the credibility of this witness. It certainly goes to his truthfulness.
>
> I believe that is certainly an area that I can get into this particular witness and whether the jury should accept his testimony.

(A3034).

Counsel for petitioner objected to the government's plan to cross-examine the witness on a collateral issue:

> MR. QUERQUES: It is something which never happens, I also gather. I think *all it does*

is it shows a propensity to commit a crime which is not even connected to Mr. Auricchio.

THE COURT: *No, it's not connected to him.*

MR. QUERQUES: But it isn't connected to him.

THE COURT: He has to connect it first.

MR. QUERQUES: *The mere asking of the question is a continual wafting of these innuendos and insinuations into the jury box that we can't prepare a defense for. It's grossly unfair, judge.*

THE COURT: No. If you establish that he was representing Mr. Auricchio in connection with a municipal court matter, and if you have a good faith basis for believing that the person handling that matter was prepared to offer false testimony, I think that goes to his credibility.

MR. QUERQUES: Who is the person who did this.

THE COURT: Provided you get far enough along to show he was handling the matter in which you have a good faith basis for believing the false testimony was being offered by the attorney.

(A3035) (emphasis supplied).

Counsel for petitioner then requested that the testimony be taken outside the presence of the jury because of its capacity to irreparably prejudice petitioner's rights at trial:

MR. QUERQUES: *Judge, I want to request that you take this testimony outside the presence of the jury, because if it comes out the wrong way, moving to strike it will not cure the problem.*

THE COURT: If it comes out the wrong way it won't be. He'll just deny it, or he may not have been representing the petitioner in that case.

MR. QUERQUES: But the suggestion is made nonetheless.

THE COURT: No, I don't think he's entitled to the warning.

MR. QUERQUES: It wouldn't be a warning. Once he answers the question, he's stuck with the answer.

THE COURT: No, I think we will be on in the normal course.

(A3035-A3036) (emphasis supplied).

Although the prosecutor had represented to the court that the evidence he was going to elicit would not impeach petitioner directly but only the witness, the testimony which was adduced was devastating: it was as destructive of the credibility of the witness as it was of the petitioner. Lynch was presented with a note from his file which indicated that he was representing petitioner on three successive municipal court matters: one arising out of Edison Township in June 1979; one arising out ot Old Bridge Township in July 1979; and one arising out of Old bridge Township in September 1979 (A3051). The witness was then asked the following:

> Q. Mr. Lynch, did you also write a note to yourself back in 1979 that, "The only case that we have a possible shot at winning is the 9-29-79 case. *Louis pulled a switch before the cop stopped him and his passenger (girlfriend) will plead guilty to speeding.*"
>
> Did you make that note to yourself?
>
> A. That's my handwriting.

(A3052) (emphasis supplied).

Lynch's testimony that petitioner switched places with the passenger before the police stopped the car suggested to the jury that petitioner not only acted dishonestly in changing places with the passenger, but that he also was willing to obstruct justice by having his girlfriend lie and enter a guilty plea to an offense which petitioner committed. Lynch, of course, also appeared dishonest because the note could be read to suggest that he was willing to permit perjured testimony to be offered to the court.

Cross-examination continued with questioning about another of the municipal cases on which Lynch was representing petitioner. This time, the witness was shown another note which, in handwriting, stated: "Linda Heitman — passenger in car on July 15 who will testify that she was driving and will plead guilty to careless driving." The witness again admitted that the handwriting was his (A3053). And once again, the testimony had a devastating effect on petitioner's credibility. The note plainly made it appear that both petitioner and the witness were willing to permit perjured testimony, in the form an unfounded guilty plea, to be adduced in court.

To make matters worse, the district judge, over the strong

objection of petitioner's attorney, admitted the notes of Lynch into evidence. The following exchange occurred:

> MR. ASHRAFI: I offer Government Exhibit 863 and 864 in evidence. Those are the sheets containing the notations that Mr. Lynch testified about.
>
> MR. QUERQUES: I'm objecting to that, 863 and 864. He had the benefit of the testimony which I've objected to. I think on cross-examination — on redirect examination the witness explained that they are nothing more than notes.
>
> Again I suggest to the court that we are getting into extremely collateral matters. This jury will be discussing nonissues in this case rather than the real issues in this case.
>
> THE COURT: I've already ruled the information is admissible. I don't know that the documents themselves have to go in evidence. What do they add?
>
> MR. ASHRAFI: The reason they have to go in evidence is exactly what Mr. Querques has brought up, that on redirect examination he questioned Mr. Lynch about the source of the information and what it was that he was doing when he wrote these notes.
>
> It is because of that that the document itself should be available to the jury to look at so that they can make a judgment about the accuracy of Mr. Lynch's testimony.

> THE COURT: I think that's right. The context and the matter of expression is important. I'll admit them in evidence. What are the numbers?
>
> MR. ASHRAFI: 863 and 864.

(A3159-60).

In his summation, the government attorney used the 1979 municipal court matters to hammer away at the credibility of Lynch's testimony respecting the loans made by Louis Auricchio Sr. to petitioner:

> Mr. Lynch saying there were $50,000 of notes that he saw is somewhat questionable, especially because of what you know about Mr. Lynch, which is that *he is an attorney who in his own notes, a municipal court case, indicated that he was prepared to present false testimony in a court.*

(A3540) (emphasis supplied).

The prosecutor then emphasized that the jury should look at the notes prepared by Lynch:

> I notice Mr. Querques asked Mr. Lynch questions about those notes, but *you look at those notes yourself.* I don't remember the exhibits numbers right now. *You look at what. Mr. Lynch wrote in his own notes. When you look at that you will see that you cannot trust Mr. Lynch's testimony in this case.*

(A3540) (emphasis supplied).

As noted above, the notes to which the prosecutor was referring are not only impeaching of Lynch, but of petitioner as well. *See* SA1-2 (notes of Gerald Lynch). Plainly, the trial court committed an error devastating to petitioner's rights by permitting the government to adduce testimony and extrinsic evidence relating to a 10-year old matter that was completely collateral to the issues at trial. The gravity of the error was compounded because petitioner did not testify on his own behalf at trial and therefore he could not respond to the evidence directly.

Once the jury disbelieved Lynch, the entire defense of petitioner was destroyed. If the jury believed that Lynch were lying about the $500,000 note and thought that the note was a sham, that would lead to the conclusion that petitioner, who signed the note, had fabricated evidence. Further, the rejection of Lynch's testimony would also result in the rejection of the testimony of petitioner's father, who not only testified about the loans he had made to petitioner and the consolidation note, but about his son's coin transactions as well.[2]

The Federal Rules of Evidence were formulated to prevent collateral and highly inflammatory matters from infecting the central issues at trial, as has occurred here. Insofar as the evidence adduced through Lynch was directly impeaching of petitioner, it is barred by Rule 404(b), which specifically prohibits the receipt of such evidence:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show

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2. Indeed, the letter written by Juror LaRosa to the foreperson complaining about juror number 5, stated that juror number 5 made the remark that "if we believed Louis Jr.'s father gave him $325,000 we've got to be crazy."

> action in conformity therewith. It may, however, be admissible for any other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The policy behind Rule 404 is that a petitioner "should be confronted at trial only with that evidence of uncharged crimes which is relevant to his responsibility for the charged crime." *United States v. Pantone*, 609 F.2d 675, 683 (3rd Cir. 1979). By limiting the admissibility of evidence of prior bad acts, the rule prevents collateral matters from being given undue weight by the jury and ensures that the jury will not "prejudge one with a bad general record and deny him a fair opportunity to petitioner against a particular charge." *United States v. Perry*, 512 F.2d 805, 806 (6th Cir. 1975), *citing* 1 Wigmore, Evidence (3d ed. 1940) § 57. Even if the evidence sought to be admitted under Rule 404 is probative of the charges against petitioner, it must still be weighed against the prejudicial impact of the evidence. *United States v. McFadyen-Snider*, 552 F.2d 1178, 1183 (6th Cir. 1977). If the prejudice resulting from the admission of the evidence outweighs its probative value, the evidence must be excluded. *Id.*

Even if the evidence adduced through Lynch were not directly impeaching of petitioner, and were only impeaching of Lynch himself, it would still be inadmissible under the Federal Rules of Evidence. Rule 608(b) restricts the circumstances under which specific instances of a witness' misconduct can be used to impeach the witness:

> (b) Specific instances of conduct. — *Specific instances of the conduct of a witness*, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, *may not be proved by*

> extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

By its terms, Rule 608(b) bars admission of extrinsic evidence to impeach a witness. *See, United States v. McNeill*, 887 F.2d 448, 453 (3rd Cir. 1989). Here, the trial judge should never have permitted the government to cross-examine Lynch on collateral matters. Not only were the incidents raised 10 years' old, but no evidence whatever was adduced that the witness did anything that was dishonest. In particular, no proof was offered by the government that the attorney permitted a witness to testify falsely in municipal court. What the government asked the trial judge to do was to allow an impeaching examination on a collateral issue on the theory that the credibility of the witness today should be questioned because ten years ago he wrote a note suggesting that he would tolerate the entry of a false guilty plea. Given that the witness did not actually do what was suggested in the note, the trial court should have barred the testimony not only because it was unduly prejudicial, and therefore excludable under Rule 403 of the Federal Rules of Evidence, but because it had no probative value whatever. At minimum, the court should have granted petitioner's request to conduct a *voir dire* examination of the witness in order to ascertain the admissibility of his testimony and to avoid the irreparable prejudice that infected petitioner's trial by permitting the jury to hear the witness' extraordinarily inflammatory testimony and to review his equally inflammatory documents. *See United States v. Hill*, 550 F. Supp.

983, 989 (E.D. Pa. 1982) (witness examined outside presence of jury when Rule 608 problem arose).

Even if, under some theory, the questioning of the witness were permissible, the documents of the witness should never have been received in evidence. The documents constituted extrinsic evidence which is specifically barred by Rule 608. *See United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) (although disbarment of an attorney is the proper subject of impeachment, whether witness admits or denies suspension, documents evidencing suspension are inadmissible under Rule 608's bar on extrinsic evidence).[3] The Third Circuit, by holding that the attorney's notes did not constitute extrinsic evidence and by further holding that the notes were properly used for impeachment purposes, misapplied the law.

Because the trial judge plainly abused his discretion in permitting witness Lynch to be impeached on an inflammatory collateral issue and in also admitting into evidence extrinsic impeaching documents, the petition for certiorari should be granted.

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3. In *Carter v. Hewitt*, 617 F.2d 961, 969 (3rd Cir. 1980), the Third Circuit ruled in *dictum*, that if the witness admits to authorship of a writing, the writing is not barred by Rule 608's prohibition on extrinsic evidence. The letter at issue in *Carter*, however, was not collateral to the proceedings, but rather was held to constitute direct evidence. Here, the impeaching documents are plainly collateral to the issues at trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

MICHAEL A. QUERQUES
ALAN L. ZEGAS
Attorneys for Petitioner

APPENDIX A — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED APRIL 16, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5639

UNITED STATES OF AMERICA

vs.

AURICCHIO, LOUIS H., JR.

Appellant

SUR PETITION FOR REHEARING

BEFORE: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges*, and KOSIK, *District Judge**

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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* Honorable Edwin M. Kosik, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

Appendix A

By the Court,

s/ Walter K. Stapleton
Circuit Judge

Dated: April 16, 1990

APPENDIX B -- MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 27, 1990

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5639

UNITED STATES OF AMERICA,

v.

LOUIS AURICCHIO, JR.,

Appellant

Appeal from the United States District Court for the District of New Jersey
(D.N.J. Crim. No. 88-10)
District Judge: Honorable Dickinson R. Debevoise

Submitted Under Third Circuit Rule 12(6)
January 30, 1990

BEFORE: STAPLETON and MANSMANN, *Circuit Judges*, and KOSIK, *District Judge*.*

MEMORANDUM OPINION OF THE COURT

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* Honorable Edwin M. Kosik, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

Appendix B

STAPLETON, *Circuit Judge.*

Following a 19-day jury trial, appellant Louis Auricchio, Jr. was found guilty on three counts of income tax evasion in violation of 26 U.S.C. § 7201.[1] Appellant appeals the final judgment of conviction entered by the district court on July 27, 1989. We have jurisdiction under 28 U.S.C. § 1291.

Appellant raises four challenges to his conviction: (1) improper admission of impeachment testimony and improper limitations on the scope of redirect examination; (2) erroneous denial of motion for judgment of acquittal on count one due to the government's purported failure to establish a reliable opening net worth; (3) violation of right to fair trial due to admission into evidence of a gun and a posed photograph of appellant holding a gun, and due to the district court's denial of appellant's motion to sever the drug count; and, (4) violation of right to trial by a fair and impartial jury due to the jury's exposure to extrinsic information. We find these challenges to be without merit.

A. *Impeachment of Attorney Lynch*

Appellant contends that the district court improperly allowed the government to impeach the credibility of defense witness Gerald Lynch, Esq. Specifically, the government was permitted to introduce notes from Lynch's file regarding his representation of appellant on certain municipal traffic offenses ten years earlier, revealing that Lynch was prepared to put witnesses on the stand to give untruthful testimony.

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1. Appellant was also charged with conspiring to distribute and to possess with the intent to distribute cocaine. A mistrial was declared on this charge because the jury could not reach a verdict.

Appendix B

Lynch testified on direct examination that in 1984 he had prepared a consolidated note for $500,000, representing $325,000 in loans (plus interest) made to appellant by appellant's father. This testimony, which corroborated that given by appellant's father, was intended to support appellant's defense that in calculating appellant's net worth, the government had failed to take into account various sources of cash, including loans received from appellant's father. On cross-examination, Lynch acknowledged writing the following note in his files regarding his representation of appellant in three 1979 municipal court matters:

> The only case that we have a possible shot at winning is the 9-29-79 case. Louis pulled a switch before the cop stopped him and the passenger (girlfriend) will plead guilty to speeding.

Similarly, Lynch acknowledged writing a note which stated that appellant could "beat" another one of the charges because he had a "passenger in car on July 15 who will testify that she was driving and will plead guilty to careless driving." Appellant challenges the admission of both the cross-examination on this matter as well as the admission of the actual notes, relying on Federal Rules of Evidence 404(b), 403, and 608.

Rule 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith." Appellant contends that the cross-examination of Lynch regarding the planned perjury in appellant's prior traffic offense cases violated Rule 404(b) because it not only served to impeach Lynch, but also to reveal to the jury that appellant had been charged with these prior offenses and was willing to have witnesses offer perjured testimony

on his behalf. Alternatively, appellant contends that even if the evidence adduced through Lynch was admissible under Rule 404(b), it should have been excluded under Rule 403 because its prejudicial effect outweighed its probative value.

We find that the cross-examination of Lynch on this matter was a proper attempt by the government to impeach him, and that any matters incidentally revealed about appellant did not implicate Rule 404(b). Moreover, the probative value of this cross-examination was so great as to the truthfulness of Lynch's testimony about preparation of the $500,000 note that any prejudicial effect was far outweighed, and therefore was within the permissible scope of Rule 403.

Finally, appellant contends that the introduction of Lynch's testimony and the actual notes violated Rule 608(b), which prohibits the use of extrinsic evidence when attacking a witness's credibility with specific instances of conduct. Even assuming that the introduction of Lynch's actual notes violated Rule 608(b),[2] we conclude that it was harmless error in light of the fact that Lynch's cross-examination testimony on this matter was nevertheless properly admitted, and thus the jury would have learned the content of the notes even if the actual notes had been excluded. Accordingly, we find that the district court did not abuse its discretion in admitting the evidence at issue.

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2. *United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989); *but see Carter v. Hewitt*, 617 F.2d 961, 971-72 n.11 (3d Cir. 1980)("the extrinsic evidence ban should be relaxed when the witness sought to be impeached *admits* the impeaching act").

Appendix B

B. *Impartial Jury*

Appellant contends that his right to trial by a fair and impartial jury was violated because the jury was improperly influenced by trial publicity. Appellant points to the fact that there were numerous newspaper articles during the course of the trial which contained appellant's photograph and referred to him as a member of an organized crime family involved in gambling, loansharking, and narcotics activities. Appellant contends that such extrinsic information thus improperly entered into the deliberative process. In support of this argument, appellant relies primarily two incidents: (1) one of the jurors was found with a newspaper which contained an article about the trial; and, (2) juror #3 sent a note to the jury foreman seeking to have juror #5 disqualified for making derogatory remarks about appellant during the jury deliberations.

(1) *Exposure to newspaper articles.*

On the second day of trial, one of the jurors had a newspaper in the jury room which contained a photograph of appellant with an article entitled "Tax-drug trial told new mob star lived like king." The incident was reported to Judge Debevoise, who questioned the juror at sidebar. The juror stated that he had not read the article "and immediately turned the page again and notified the people that were in the room . . . and told them that they shouldn't read it. So nobody has read the article." The juror stated he had not seen the headline. When Judge Debevoise subsequently questioned the remaining eleven jurors individually regarding this matter, it was revealed that six of the jurors were not even in the jury room when the juror brought in the paper. Of the five others who were present, each stated that they had caught a glimpse of the photograph, but had not read the headline

or the article, and that their ability to remain impartial had not been tainted by seeing the photograph.

In denying appellant's motion for a mistrial on this ground, Judge Debevoise made the following findings and conclusions:

> It was anticipated that there might be some publicity attendant upon the trial, and at the outset I explained to the jury why it was of the ultimate importance that no outside information come to its attention, that it was quite likely that newspaper articles and other media attention would refer to the trial and that they, the jurors, must not read or listen to anything. These kinds of instructions were given throughout the trial and the deliberation process.
>
> It soon became apparent that the jury was particularly sensitive to that problem. Very early in the trial one or more jurors brought a copy of the Star-Ledger into the jury room to read. On an inside page it contained a photograph of the defendant and an article about him. As soon as someone noticed the photograph Juror No. 1 advised everyone not to look at the article and collected the newspapers. This was brought to my attention and thereafter each juror was questioned individually about what he or she had seen or read. Thus the jury itself had shown it was fully aware of its responsibility not to read about the case and had acted responsibly to prevent that from happening . . .

Appendix B

> There were articles about the trial and about the defendant from time to time during the course of the trial. They appeared in various New Jersey newspapers, but it was hardly a media event, the articles usually appearing in back pages of the papers. Each evening when court recessed the jurors were admonished not to read or listen to anything about the case, and it is my recollection that on some occasions when there was a particularly striking article about the defendant I asked the jurors whether they had seen, perhaps inadvertently, something in the press about the case.

Based upon our review of the record, we find that Judge Debevoise's factual findings that the jurors' impartiality was not affected by the newspaper episode are not clearly erroneous. Accordingly, we find appellant's contention that he was deprived of a fair and impartial jury on this ground to be unsupported by the record, and we find no abuse of discretion by the district court in its handling this matter. *See Patton v. Yount*, 467 U.S. 1025, 1031 (1984); *Government of Virgin Islands v. Dowling*, 814 F.2d 134, 139-40 (3d Cir. 1987).

(2) *Letter from Juror #3.*

The letter sent by juror #3 to the jury foreman during deliberations stated in relevant part:

> . . . juror number 5 [should be] disqualified for his continued outburst of derogatory and prejudicial remarks during our deliberations. An example of his conduct, he frequently says the

> defendant is so devious that he has to be dealing in drugs . . . Another remark was made that if we believed Louis Jr.'s father gave him $325,000.00 we've got to be crazy. There were also other remarks made that if you were in the Mafia you could afford a house in East Hampton. There was never a mention about the Mafia during this trial.

The district court distributed the letter to counsel and discussed with them how best to handle the matter. After hearing argument from counsel, Judge Debevoise concluded that there was no reason to believe juror #5 had been exposed to prejudicial trial publicity:

> . . . the Mafia remark could come from the evidence and not from having read newspapers and the like.
>
> The whole narrow episode, the social club, et cetera, could suggested [sic] to some people that kind of thought. It is just as likely that Juror No. 5 made deductions from that kind of evidence which was in this case.
>
> The club over in Long Island with the slot machines, where they were stored, et cetera, or the vending machines were stored.
>
> So it need not come from the outside.

The district court then denied appellant's motion for a mistrial, and before the jury resumed deliberations, gave a lengthy charge cautioning the jurors not to stray beyond the evidence

presented in the case. Additionally, in denying appellant's motion for a new trial on this ground, the district court made the following findings and conclusions:

> [The note from juror #3] nowhere states that Juror No. 5 referred to newspaper articles or other matters outside the record. It reflects sharp disagreement between two jurors about what the evidence established. Juror No. 5 was entitled to argue from the evidence that "defendant is so devious he has to be dealing in drugs," or that "If we believe Louis Jr.'s father gave him $325,000 we've got to be crazy." . . .
>
> The statement that "If you were in the Mafia you could afford a house in East Hampton" was perhaps an intemperate remark, but . . . [t]here was ample evidence in the case relevant to the charges at issue which to some might suggest organized crime . . . We cannot know how Juror No. 5 was using the term, but there is nothing to suggest he was reporting the substance of newspaper articles in the deliberations. . . .
>
> Juror No. 3 was particularly sensitive to the possibility that other jurors might be exposed to newspaper material as evidenced by his comments to me on the second day of trial when I questioned each juror about potential exposure to newspaper articles. Given his then hostility towards Juror No. 5, if Juror No. 5 had committed any impropriety of this nature, Juror No. 3 would surely have referred to it in his letter.

Again, we find nothing in the record to suggest that Judge Debevoise's factual findings on this matter are clearly erroneous. At most, the letter to the foreman by juror #3 reflects that there was a difference of opinion between two jurors.[3] We find no basis for concluding that the district court abused its discretion in declining to conduct an individual *voir dire* upon receipt of the note from juror #3. *Dowling*, 814 F.2d at 137.

Finally, we have reviewed appellant's remaining contentions and find that they are also without merit. Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:.

Please file the foregoing Memorandum Opinion.

s/ Walter K. Stapleton
Circuit Judge

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3. Appellant also stresses that juror #3 improperly formulated an opinion concerning the implications of the trial testimony before all of the evidence had been presented in violation of the district court's instruction that decision should be reserved until that point. While we agree that it is a fair inference that juror #3 did not follow the court's pretrial instruction, we know of no authority for the proposition that this is the kind of error that requires reversal and a new trial.

APPENDIX C — OPINION OF HON. DICKINSON R. DEBEVOISE ON JURY ISSUE DATED JUNE 27, 1989

[Commencing at page 28, the Court stated:]

. . . On May 26, 1989 defendant Louis Auricchio was convicted on three counts of income tax evasion. The jury was unable to agree on a verdict on a fourth count which charged defendant with participation in a conspiracy to distribute cocaine and to possess cocaine with intent to distribute it. A mistrial was declared on that count.

Shortly after the verdict was entered defendant moved, (i) for a judgment of acquittal on Count 1 on various grounds, (ii) for a new trial on the ground that the jury verdict was a product of improper juror conduct, (iii) for dismissal of Count 4 [29] on various grounds, (iv) for a new trial on the grounds that certain of the requested charges were not given, (v) for a new trial on the ground that the government was allowed improperly to impeach certain defense witnesses, (vi) for a new trial on the ground that the Court improperly denied defendant's pre-trial motions for discovery of 1986 wiretaps made on government witness Vincent Tedesco and for a separate trial on Count 4 from Counts 1, 2 and 3.

In support of all except the second of these motions defendant relied on his arguments made before and during trial. For the reasons given at those times I deny those five motions. Defendant has briefed and argued extensively his second motion, namely that he be given a new trial on the ground that his conviction was the product of a biased jury which received evidence outside the record and on the further ground that the Court failed to take all available measures to protect the defendant from the corruption of the jury process.

Appendix C

The motion arises out of an episode which occurred on May 26, 1989, the second day of the jury's deliberations. At the outset of the day I was given a letter which Juror 3 had handed to the juror selected as foreperson. The letter said:

> "Mr. Foreman:
>
> As selected citizens for this jury it is our sworn duty to give the benefit of doubt to any defendant, and in all fairness to Louis Auricchio, Jr. it is our obligation to hear arguments of both the prosecutor and the defense.
>
> [30] I will make an appeal to the judge to have Juror No. 5 disqualified for his continued outburst of derogatory and prejudicial remarks during our deliberations. An example of his conduct, he frequently says the defendant is so devious he has to be dealing in drugs, and this was when we were only on the first count of the indictment dealing with the 1981 tax dispute. Another remark that was made is if we believed Louis Jr.'s father gave him $325,000 we've got to be crazy. There were also other remarks made that if you were in the Mafia you could afford a house in East Hampton. There was never a mention about Mafia during this trial.
>
> Starting from day one of this trial he was the judge, jury and prosecutor without hearing from one witness for the defense. Therefore, I will not tolerate this kind of behavior any further. I do not have to remind everyone we do have a young

> man's life in our hands and we should not take anything like this too lightly or excuse it because of his age. If it continues I will seek whatever avenue necessary to declare a mistrial.
>
> Respectfully."

I distributed the letter to counsel and on the record we discussed how the matter should be handled. Ultimately I concluded that this was an instance of strong feelings being expressed by two of the jurors who were in sharp disagreement about the merits of at least part of the government's charges. It appeared to me that the appropriate course was to advise the jurors once again that they were to decide the case solely on the basis of the evidence, that they were to listen to eveyone's opinion, but that they were to resolve the matter only on the evidence seen and heard in the courtroom. My specific instruction was as follows:

> [31] I am going to send you back to deliberate in just a moment.
>
> I want to remind everybody that jury deliberations are a give and take proposition. Everybody is analyzing the evidence, everybody is looking at the evidence.
>
> If anybody strays beyond the evidence, then you can come back and just consider the evidence in the case, but nobody must get upset about what people say, about what people do. Just as long as ultimately what you do, the analysis of the evidence, apply the evidence to the law as I gave it to you, and come to a result.

Appendix C

You can't let hard feelings, you can't let disagreements, you probably heard stories of juries shouting and screaming at each other being heard in the halls and whatnot. I'm sure that's not what is going to happen here, but this is a natural course of events.

There are disagreements and there are different points of view, and you just try to work as rational human beings, consider the evidence, and that's what you are tied to, just the evidence in the case, nothing else. Analyze it and reach a result.

Let me know when you want to go home tonight, and I gather you would prefer not work over the weekend if we don't finish by the end of today. Nobody would want to come in on Saturday, Sunday or Monday. I see you shaking your heads.

All right, we have a whole week ahead of us, and if necessary we can take as much of that as is required.

So just, I say, be calm and dispassionate. That's difficult to do, but eventually you can work with each other, discuss things, everybody is entitled to be heard, everybody's opinion can be reviewed, but in the last analysis you just have to decide it simply on the evidence in the case, only what you have seen here and heard in the courtroom, and I'm sure you will come to the

appropriate resolution of the case.

The ultimate verdict suggests that the jury did exactly what they were instructed to do. After further deliberation they reached agreement on the three income tax evasion counts and they failed to reach agreement on the cocaine conspiracy [32] count. The jury was polled on the three counts of conviction, and Juror No. 3 who had written the letter had no hesitation in affirming that he agreed with the verdict. One would suspect, but never know, that he did not believe that the evidence established guilt on Count 4 and voted accordingly.

Defendant notes, quite correctly, that a defendant's due process rights are violated if evidence other than that introduced at trial is received by the jury, e.g., *Marshall v. United States,* 360 U.S. 310 (1959). Defendant also correctly notes that a juror who holds an ethnic bias against a defendant cannot fairly sit in judgment upon him, e.g., *United States v. Heller,* 785 F.2d 1524 (11th Cir. 1986).

Let me first state that reference to the Mafia does not demonstrate an ethnic bias. This is a name for specific organized crime groups used by persons of all national origin in law enforcement circles and in the population generally. Juror No. 5's use of the term would not show a bias on his part.

More importantly, defendant argues in the present case that the letter written by Juror No. 3 demonstrates that extrinsic evidence was received by the jury through Juror No. 5. To the extent that the letter purports to describe what took place during jury deliberations I shall assume it is a correct recital of events. I do not believe that I can or should accept what Juror No. 3 asserts Juror No. 5 heard during testimony by defense witnesses.

Appendix C

The final paragraph of the letter, which [33] asserts that Juror No. 5 did not hear the defense witnesses, must be treated for what it obviously is, a pejorative expression of Juror No. 3's disagreement with the views of juror Number 5.

The essence of defendant's argument is that there were numerous newspaper articles during the course of the trial which showed defendant's photograph and which, while describing the trial proceedings, referred to defendant as a member of the Genovese organized crime family and the successor to the murdered John DiGilio's gambling, loansharking and narcotics activities in northern New Jersey. Defendant concludes from Juror No. 5's reference to the Mafia during deliberations that he read some or all of these articles and in effect introduced them to the jury.

A review of the trial proceedings and an examination of the statement itself provides no support for that conclusion.

The jury was selected on April 17, 1989. The opening statements were delayed until April 20 so that defense counsel could complete an assigment elsewhere. It was anticipated that there might be some publicity attendant upon the trial, and at the outset I explained to the jury why it was of the ultimate importance that no outside information come to it's attention, that it was quite likely that newspaper articles and other media attention would refer to the trial and that they, the jurors, must not read or listen to anything. These kinds of [34] instructions were given throughout the trial and during the deliberation process.

It soon became apparent that the jury was particularly sensitive to that problem. Very early in the trial one or more jurors brought a copy of the Star-Ledger into the jury room to read.

On an inside page it contained a photograph of the defendant and an article about him. As soon as someone noticed the photograph Juror No. 1 advised everyone not to look at the article and collected the newspapers. This was brought to my attention and thereafter each juror was questioned individually about what he or she had seen or read. Thus the jury itself had shown it was fully aware of its responsibility not to read about the case and had acted responsibly to prevent that from happening. This episode occuring very early in the case also provided a useful opportunity to demonstrate to the jury how important it was to observe the Court's instructions on the subject.

The trial continued from its opening on April 20 until May 25 when the jury began its deliberations. There were articles about the trial and about the defendant from time to time during the course of the trial. They appeared in various New Jersey newspapers, but it was hardly a media event, the articles usually appearing in back pages of the papers. Each evening when court recessed the jurors were admonished not to read or listen to anything about the case, and it is my [35] recollection that on some occasions when there was a particularly striking article about the defendant I asked the jurors whether they had seen, perhaps inadvertently, something in the press about the case.

Thus we come to the letter of Juror No. 3. It nowhere states that Juror No. 5 referred to newspaper articles or other matters outside the record. It reflects sharp disagreement between the two jurors about what the evidence established. Juror No. 5 was entitled to argue from the evidence that "defendant is so devious he has to be dealing in drugs," or that "if we belive Louis Jr.'s father gave him $325,000 we've got to be crazy." See *Smith v. Brewer*, 444 F. Supp. 482, 489-90 (S.D. Iowa) aff'd, 577 F. 2d 466 (8th Cir.), cert. denied, 439 U.S. 967 (1978). Juror No. 3

was entitled to disagree with these evaluations and to argue hotly and vociferously the other way.

The statement that "if you were in the Mafia you could afford a house in East Hampton" was perhaps an intemperate remark, but the term "Mafia" is a recognized term in American society referring to specific organized crime groups. There was ample evidence in the case relevant to the charges at issue which to some might suggest organized crime. Further, it is a term used by some very loosely and broadly to refer to almost any group of criminals or criminal activity. We cannot know how Juror No. 5 was using the term, but there is nothing to suggest [36] he was reporting the substance of newspaper articles in the deliberations. What is clear is that people outside the jury room cannot intrude upon the deliberative process by attempting to censor the jurors' debate, because from that debate, however wild it may at times be, we expect, and I am confident, receive just verdicts. Whether before or after a verdict is reached, it would violate well recognized principles of law to inquire into a juror's thought processes. *Tanner v. United States,* 97 L.Ed. 2d 90 (1987), *Government of the Virgin Islands v. Gereau,* 523 F.2d 140 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).

Let me at this point correct defendant's misinterpretation of my statement that "during the course of deliberations in many cases jurors do in fact depart from the strict evidence of the case and the balance of the jurors are required to bring it back in conformity with the instructions of the Court. That's why we have 12 people, so they can ultimately as a group decide on the basis of the appropriate evidence, and if any individual juror strays, the other 11 or 10, however many, bring them back."

Defendant concludes on the basis of that statement that I

held "that there was nothing wrong with the interjection of extrinsic information about defendant into the deliberative process" (Defendant's brief at page 18). Nothing could be further from my holding. Obviously if extrinsic evidence about defendant is submitted to a jury, it would be improper and might [37] well call for a mistrial. That is to be distinguished, however, from arguments which jurors make during the course of deliberations, not based on receipt of extrinsic evidence, but simply thrown out by individual jurors during their discussions. There is no censor in the jury room to limit what jurors say. It would reflect the ultimate in unreality to believe that jurors observe rules of evidence and relevance in their discussion. No doubt jurors disagree, get angry with each other, say wild and foolish things, pound the table, shout and scream. But it is the function of the jury as a whole to resolve those differences if they can, be guided by the charge that is given them, decide the facts on the basis of the evidence before them and arrive, as I said before, at a just verdict.

Normally all this does and should take place behind closed and guarded doors. We see only the end product in the form of the verdict or in announcement that agreement cannot be reached. In the present case through Juror 3's letter we have been given a peek into the jury room, but nevertheless this is not a usual examination and it is something from which we are barred in the normal course of events. It does not justify our intruding into the jury process, and consequently is not a matter which should be pursued further.

There is no basis for a hearing. Nothing in the letter of Juror No. 3 states or suggests that Juror No. 5 introduced [38] extrinsic evidence into the jury room in the form of newspaper information or otherwise. Juror No. 3 was particularly sensitive to the possibility that other jurors might be exposed to newspaper

material as evidenced by his comments to me on the second day of trial when I questioned each juror about potential exposure to newspaper articles. Given his then hostility towards Juror No. 5, if Juror No. 5 had committed any impropriety of this nature, Juror No. 3 would surely have referred to it in his letter. Under the circumstances of this case no hearing was or is required. *United States v. Duzac*, 622 F.2d 911 (5th Cir. 1980).

For similar reasons it would be inappropriate to permit defendant or the government to question the jurors about what went on in the jury room. Any actions that would tend to diminish the confidence of jurors that their deliberations are matters for themselves alone would have an adverse impact on the jury system.

For the foregoing reasons defendant's motion for a new trial on the grounds that the jury was biased and received extrinsic evidence is denied. I shall sign the order that the government submitted.

* * *

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 21, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Case Number: 88-10-01

UNITED STATES OF AMERICA

V.

Louis Auricchio Jr.

JUDGMENT IN A CRIMINAL CASE

Michael Querques
Attorney for Defendant

THERE WAS A:
verdict of guilty as to counts 1, 2, and 3.

THERE WAS A:
mistrial on count 4.

THE DEFENDANT IS CONVICTED OF THE OFFENSE OF:
Income tax evasion.
26:7201
Cts. 1, 2 and 3.

IT IS THE JUDGMENT OF THIS COURT THAT: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years on count 1 and pay a fine of $10,000.00

Appendix D

or stand committed until said fine is paid. On count 2 imprisonment for a term of four (4) years and pay a fine of $10,000.00 or stand committed until said fine is paid. On count 3 imprisonment for a term of four years (4) and pay a fine of $10,000.00 or stand committed until said fine is paid. Said sentences on counts 2 and 3 are to be served consecutively to each other and to the sentence imposed on count 1. The total sentence imposed is twelve (12) years imprisonment and a committed fine of $30,000.00.

Date of Imposition of Sentence: 7-27-89

Signature of Judicial Office: s/ Dickinson R. Debevoise

Name and Title of Judicial Officer: Dickinson R. Debevoise, U.S. Judge

Date: 7-27-89

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.

ATTEST:

United States District Court
District of New Jersey
By: s/ Eric W. Voorhees
Deputy Clerk

[Filed July 27, 1989]

APPENDIX E — LETTER OF JUROR MAURICE LA ROSA TO JURY FOREMAN DATED MAY 25, 1989

May 25, 1989

Mr. Foreman,

As selected citizens for this jury it is our sworn duty to give the benefit of doubt to any defendant, and in all fairness to Louis Auricchio Jr. it is our obligation to hear arguments from both the prosecutor and the defense.

I will make an appeal to the judge to have juror number 5 disqualified for his continued outburst of derogatory and prejudicial remarks during our deliberations. An example of his conduct, he frequently says the defendant is so devious he has to be dealing in drugs, and this was when we were only on the first count of the indictment dealing with the 1981 tax dispute. Another remark that was made was if we believed Louis Jr.'s father gave him $325,000.00 we've got to be crazy. There were also other remarks made that if you were in the Mafia you could afford a house in East Hampton. There was never a mention about the Mafia during this trial.

Starting from day one of this trial he was the judge, jury and prosecutor without hearing from one witness for the defense. Therefore, I will not tolerate this kind of behavior any further. I do not have to remind everyone we do have a young man's life in our hands and we should not take anything like this too lightly or excuse it because of his age. If it continues I will seek whatever avenue necessary to declare a mistrial.

Respectfully,

s/ Maurice La Rosa
MAURICE LA ROSA

Tax-drug trial told new mob star lived like king

By P. L. WYCKOFF

A reported rising star in the Genovese crime family in New Jersey bought a home in East Hampton, N.Y., when he was 21 and a new Mercedes every year while participating in a cocaine distribution conspiracy, a federal prosecutor told jurors yesterday.

But the defense attorney for Louis Auricchio Jr. said tax and drug charges against the Holmdel resident, now 30, were a smear campaign by the government, using figures built on "quicksand."

The conflicting portraits of Auricchio came during opening statements in what is expected to be a three- to four-week trial in Newark. In addition to the cocaine count, the government alleges Auricchio either failed to pay or underpaid income taxes from 1981 through 1983.

Assistant U.S. Attorney Victor Ashrafi charged that from November 1982 until August 1984, Auricchio received more than $1 million from a man he recruited to sell cocaine.

Ashrafi did not name the man, but said he would testify he agreed to buy kilograms of the drug from Auricchio after Auricchio invited him to an illegal casino operating on the 19th floor of the Harmon Cove Towers apartments in 1982.

The prosecutor also said wiretaps of Auricchio's phone would buttress the drug testimony. Auricchio was warned of the investigation by law enforcement contacts, and cleaned incriminating evidence out of his apartment and businesses days before they were searched, Ashrafi added.

Louis Auricchio Jr. of Holmdel, an alleged member of the Genovese crime family on trial for tax evasion and drug charges, leaves the federal courthouse in Newark.

Ashrafi admitted the unidentified witness had agreed to testify in exchange for possible leniency on his own drug charges, and "is not a pillar of the community."

"He's not testifying here because he feels it's his civic duty to do so," Ashrafi said. "He's testifying because he got caught. He's a drug dealer and he got caught."

But defense attorney Michael Querques said the drug charge, filed months after three tax evasion charges were leveled, was a result of government "bad faith," designed to fog the minds of jurors because of the weakness of the tax case.

Querques said Auricchio had gotten a substantial loan from his father, as well as making money by selling a large collection of silver coins in 1979-1980, a time when silver prices were at historical highs.

"We're not talking about a loan here," Querques said. "We're talking about a kid born with a silver spoon in his mouth but who worked onnthe beat."

Ashrafi told jurors that besides the cocaine conspiracy, Auricchio got money from a number of other businesses he owned while a young man, including a Secaucus go-go bar called Louie Jr.'s and a delicatessen and liquor store in the Harmon Cove complex.

Auricchio's tax charges allege he filed no income tax returns for 1981 or 1983, years in which he received a total of about $170,000. He did file a return for 1982, but declared an income of about $19,000, while the charges allege his income actually was more than $550,000.

Following opening statements, Ashrafi presented testimony from an Internal Revenue Service clerk and from an accountant who helped Auricchio with his taxes. The testimony revolved around what tax forms had been filed and when.

Auricchio has been free on a $100,000 personal recognizance bond co-signed by his father. Police have reported he has taken over the territory once ruled by the late crime boss John DiGilio.

APPENDIX G — PROVISIONS OF THE FEDERAL RULES OF EVIDENCE AND OF THE UNITED STATES CONSTITUTION CITED

Federal Rules of Evidence:

Rule 404(b):

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 606(b):

> **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded

from testifying be received for these purposes.

Rule 608(b): Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

United States Constitution:

Fifth Amendment:

> No person shall be . . . deprived of life, liberty or property, without due process of law.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and district wherein the crime shall have been committed . . . .